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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, *Petitioner,*

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

(1) Under the Speech or Debate Clause, may a United States Senator criticize public spending in Congressional statements repeated in a press release and discussed in constituent newsletters without being subject to suit by the recipient of that spending?

(2) Did the Court of Appeals err in finding that oversight by a United States Senator and his aide into the extent and justification of agency spending over which the Senator has jurisdiction is not

legitimate legislative activity, immune from question under the Speech or Debate Clause?

(3) Does an individual who voluntarily seeks and obtains large amounts of public funding for research projects initiated and controlled by himself, and who invites public attention through publication of numerous articles and interviews, become a "public figure" or "public official" for purposes of discussing public funding of his work?

(4) Did the Court of Appeals err in finding in the absence of a clear showing of malice that Senator Proxmire and his aide Morton Schwartz were entitled to summary judgment for criticism of public spending in financing government research?

STATEMENT OF THE CASE

The facts pertinent to this Court's consideration are, in Respondents' view, adequately set forth in the opinions below, by Judge Leighton in the District Court and by Judge Castle for the Seventh Court of Appeals, and will not be restated here.

REASONS FOR DENYING THE WRIT

1. The Court Properly Resolved the Issues of Speech or Debate Immunity for Congressional Distribution of Information as Required by *Doe* v. *McMillan*.

In attempting to overturn the Seventh Circuit's holding that Senator Proxmire's criticism of public spending in newsletters and a press release was legitimate legislative activity pursuant to the "informing function" of Congress, Petitioner has sought to make the decision of the Court of Appeals here and those of this

Court in the past appear more absolute than is proper. Thus, the Seventh Circuit's holding is portrayed as immunizing *all* newsletters and press releases irrespective of content[1] at the same time it supposedly acknowledges that no part of the informing function is proper *legislative* activity,[2] while the language of this Court in *United States* v. *Brewster,* 408 U.S. 306 (1972) is read without reference to *Doe* v. *McMillan,* 412 U.S. 306 (1973) to hold firmly that no use of a press release or newsletter can possibly be immune.[3] Aided by these unfettered interpretations, a conflict is suggested to exist in the judiciary concerning the proper scope of the Speech or Debate Clause. The opinion of the Seventh Circuit here represents nothing more than a careful application of the principles enunciated in *Doe* v. *McMillan* that public distribution of information by a member of Congress *may* fulfill legitimate functions and thus be protected by the Speech or Debate Clause, dependent upon the nature and scope of the distribution and the Congressional purpose to be served.[4]

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[1] Petition at p. 24.

[2] Petition at p. 16.

[3] Petition at p. 15.

[4] The issue confronted in *Doe* was whether informing the public about the business of Congress, if authorized by Congress, "must *always* be considered 'an integral part of the deliberative and communicative process . . .'" *id.*, 412 U.S. at 314 (emphasis added). This Court answered no and directed a case by case analysis of whether any particular act of informing the public exceeded the legitimate needs of Congress. This directive has not bred confusion in the lower courts, as Petitioner suggests now exists, but has been aptly applied without conflict—first on remand in *Doe* v. *McMillan*, 566 F.2d 713 (D.C. Cir. 1977) *cert. den.* 98 S.Ct. 1607 (1978), and now by the Seventh Circuit here. Other

The publications at issue in the present case, as the Seventh Circuit found and stressed, did nothing more than call attention to a Congressional statement in which Senator Proxmire had criticized federal agencies for what he considered wasteful use of public funds. Because control of appropriations for public expenditures is at the heart of the powers, and therefore the business, of Congress, and because such matters involve a great degree of interaction between the public and their elected representatives, the Seventh Circuit correctly concluded that this was a type of information "[that] would require greater public distribution to properly serve legislative needs." [5] Moreover, the manners of dissemination which the Court of Appeals held to be immune, a press release and constituent newsletters, are methods expressly authorized by Congress to be used in conveying such information to the public.[6] While Respondents do not argue that the

Speech or Debate Clause cases reaching this Court have been less concerned with this issue. *See McSurely* v. *McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc) *cert. dismissed sub nom., McAdams* v. *McSurely*, 46 USLW 4878 (June 26, 1978) (No. 76-1621); *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc) *cert. granted*, 47 USLW 3301 (Oct. 31, 1978) (No. 78-5072); *United States* v. *Helstoski*, 576 F.2d 511 (3rd Cir. 1978) *petition for cert. filed*, 47 USLW 3148 (Aug. 29, 1978) (No. 78-349).

[5] *Hutchison* v. *Proxmire*, 579 F.2d 1027, 1033 n.11 (7th Cir. 1978). Support for considering the nature of the information distributed as bearing on the extent of the distribution required is strongly presented by Justice Douglas' concurrence in *Doe* v. *McMillan*, representing three of the five Justices for the majority. See 412 U.S. at 330.

[6] The franking statute, 39 U.S.C. § 3210(2) declares it to be the Congressional intent that information about the legislative process and its functions pass between the public and its representatives, and § 3210(3) specifically authorizes the use of newsletters and

Congressional decision to publicize its business in certain ways thereby confers upon those who utilize those procedures Speech or Debate immunity, it is nevertheless clear that such Congressional authorization and intent is at least highly relevant to the judicial evaluation of the proper scope of the informing function.[7]

The soundness of the Seventh Circuit's evaluation is supported by consideration of the impact on Congress that a decision adverse to Senator Proxmire and his staff would have. Any claim that public spending is wasteful inevitably implicates criticism of those individuals involved or responsible for that spending. Should these individuals be allowed to debate the merits of public spending by institution of private libel suits, the very essence of Congressional business will become isolated from public discussion, and efforts to arouse colleagues or the citizenry about issues of national importance will be severely dampened. As the Court of Appeals correctly concluded, "If the inform-

press releases for this purpose. Congress, in honoring its commitment to keep its business open and public, Constitution, Art. I, § 5, has also established press galleries, and enacted legislation authorizing radio and television broadcast of Senate business (2 U.S.C. §§ 190a(b), 190a-1(a), 190h). This could presumably include direct coverage of such statements as that made by Senator Proxmire here. The House of Representatives has recently acted as well to authorize live gavel-to-gavel broadcasts of House proceedings, House Resolution 866, adopted October 27, 1977, which is scheduled to begin in January, 1979. Further, Congress has mandated that the Congressional Record, which contained the Senator's speech, be widely distributed among governmental agencies and the news media, 44 U.S.C. § 906, and be available for sale to the general public, 44 U.S.C. § 910.

[7] *Doe* v. *McMillan, supra*, Opinion of Justice Rehnquist, concurring in part and dissenting in part, 412 U.S. at 341-42.

ing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this."[8]

2. The Court Below Was Clearly Correct in Finding Respondents' Actions Privileged Under the First Amendment Where Plaintiff Is a Public Figure and the Record Evidences an Absence of Actual Malice.

In *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), this Court strengthened the protection accorded discussion of public officials by prohibiting their recovery for defamatory falsehoods unless it could be clearly established that the statement challenged was made with actual malice, that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280. This same protection was extended to discussion of "public figures" in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967). Applied to the present case, these principles clearly dictate the propriety of summary dismissal granted by Judge Leighton in the District Court and affirmed on appeal by the Seventh Circuit.[9]

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[8] 579 F.2d at 1033. In addition to its discussion of the informing function, the Court of Appeals interpreted the Speech or Debate Clause in the contexts of Congressional investigation and oversight of agency spending. While Respondents cannot agree with the Court of Appeal's conclusion that Mr. Schwartz' "follow-up" contacts with agency officials were not legitimate legislative activity, and have presented this issue to the Court's attention, review of that issue at this time would seem unwarranted. The Court of Appeals clearly held the same conduct to be privileged under the First Amendment, and unless it is reversed on that point, the review here would consist of Constitutional interpretation without the prospect that it would affect the judgment at issue.

[9] Judge Leighton found Plaintiff Hutchinson to be *both* a public official and a public figure. The Court of Appeals affirmed on the ground that Dr. Hutchinson was a public figure without reaching the second issue.

Petitioner seeks review by claiming that the Court of Appeals was in error in its public figure determination because it "essentially rejected the standards enunciated in *Gertz* v. *Welch,* [418 U.S. 323 (1974)]".[10] A reading of the court's opinion demonstrates that this is not so. The court, while admittedly not holding that Plaintiff enjoyed any special prominence in society, nonetheless concluded that by his actions in soliciting millions of dollars of state and federal research funds for projects initiated and controlled by himself, by publishing numerous articles concerning his work, and by using his position to cultivate press connections whereby he was able to rebut criticism of the worth of his work, Petitioner had placed himself in the forefront of the public controversy concerning public funding of his work, *Gertz* v. *Welch, supra,* 418 U.S. at 345. It is to this area alone that Senator Proxmire addressed his remarks. The standards established by this Court in prior cases have clearly been followed, and the request for Supreme Court review is nothing more than an attack on the factual analysis of both lower courts, as discreetly applied to this one factual setting. It is therefore unworthy of review.

Petitioner's attacks on the "absence of malice" findings fail for the same reason. Without challenging the legal bases for the lower courts' conclusions, Petitioner attempts to create what are termed "several serious misstatements of fact" in the opinions below by misrepresenting the record before the lower courts. No recapitulation of the record is here intended, but a short canvas of the charges is presented to demonstrate the validity of the Court of Appeal's opinion.

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[10] Petition at p. 19.

It is charged that both Respondents "admittedly knew" the falsity of some of Senator Proxmire's factual statements, although no such admission was ever made and the affidavits of both state their past and present beliefs that all the facts stated by the Senator were true.[11] Those conscious misstatements laid at the Senator's door consist of (1) his criticism of the quality of Petitioner's work and the suggestion that it was "perhaps duplicative" even though the agencies involved purportedly all informed his staff that it was "sound" and contained "no overlap"; and (2) that the Senator stated that the public funds were received by Dr. Hutchinson himself rather than by the research institutions directed by him. The quality of Petitioner's work is, of course, a matter of opinion, and the record contains as well agency critiques that *support* the Senator's view as to possible duplication (see, e.g., Exs. 90 and 91).[12] So far as attributing funding directly to Hutchinson is concerned, this is—admittedly—an abbreviated style of identifying a grant recipient, but one used in agency grants themselves, and one used by Dr. Hutchinson himself in speaking of other investigators in his deposition.[13] This commonly accepted shorthand usage does not approach the knowledge or awareness of falsity required by the *New York Times* standard. As noted recently by the District Of Columbia Court of Appeals in *Wolston* v. *The Reader's Digest Ass'n., Inc.*, 578 F.2d 427, 434 (D.C. Cir. 1978):

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[11] Ex. 1, ¶ 24; Ex. 3, ¶ 39.

[12] While Petitioner is correct in stating these exhibits to be evaluations of proposed work, they were based on the agency's experience with Dr. Hutchinson's actual work and commented on his organization's "already apparent tendency to overly fragment their work" and on his "many similar studies".

[13] Hutchinson Depo., p. 208.

> Imprecision and ambiguity of expression are ills that sometimes afflict even careful and well-intentioned writers, including lawyers and judges. We think of E.B. White, commenting on a fuzzy passage in one of his essays: "The thing didn't come out as clear as I would have liked, but nothing I write ever does".

The record, once reviewed, amply supports the treatment accorded Petitioner's claims in the lower courts. Again, Supreme Court hearing is sought solely to review the unanimous factual conclusions of two courts and four judges. The First Amendment questions present here are not novel, and their resolution is in accordance with established precedent of this Court.

CONCLUSION

For the foregoing reasons, Respondents William Proxmire and Morton Schwartz respectfully pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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